

1701509 (Migration) [2018] AATA 2115 (7 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1701509

MEMBER: Kate Millar

DATE: 7 March 2018

PLACE OF DECISION: Adelaide

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa

STATEMENT MADE ON 07 MARCH 2018 AT 9:30AM

CATCHWORDS

Migration – Partner (Residence) (Class BS) – Subclass 801 (Spouse) – Whether there was a spousal relationship–Sponsorship withdrawal – No joint assets or liabilities – Lived together for a period of time – Family Violence claims – Practice and procedure – Request for further information – Extension of time – Decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65, 359, 359AA
Migration Regulations 1994, r 1.15A Schedule 2 cls 801.211, 801.221

CASES

Hanna v Minister for Immigration and Border Protection [2016] FCA 282

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection on 17 January 2017 to refuse to grant [the applicant] a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. [The applicant] applied for the visa on 24 July 2014 on the basis of his relationship with his sponsor, [Ms A]. At that time, Class BS contained Subclass 801. The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. To be granted this visa, [the applicant] must meet the primary criteria in Part 801. The primary criteria include, at cl.801.221, a requirement for the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These circumstances include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.801.221(6)(b) and (c)(i). [The applicant] claims he has suffered family violence committed by [Ms A].
4. The delegate refused to grant the visa on the basis that [the applicant] did not meet cl.801.221 as the delegate was not satisfied that there was a genuine spouse relationship between [Ms A] and [the applicant] prior to the breakdown of the relationship.

HISTORY OF THE RELATIONSHIP

5. [The applicant] said he met [Ms A] when she visited Cambodia with a relative in May 2013. He said they got along well and started a relationship, exchanging phone numbers and Facebook details. After [Ms A] returned to Australia they continued communicating two to three times a day after work. [Ms A] returned to Cambodia and they had an engagement ceremony after which [Ms A] sponsored him for a spouse visa. He arrived in Australia on 7 January 2014 and started work in a [factory]. They initially lived with [Ms A]'s sister as the house owned by [Ms A] was rented out, and when the lease expired they moved to her house.
6. They married in March 2014, and he said they had 300 guests at the wedding. After the wedding [the applicant] described the relationship at this time as cordial and loving. He says he did everything [Ms A] told him to do, but on her part, she did not follow through with anything he suggested. He said she had total control over him and would not allow him to play soccer with his friends despite him working up to 17 hours a day. He said he put up with her because he believed they were family.
7. After eight or nine months, they started having problems in the relationship, particularly after a friend's birthday party where he says [Ms A] got drunk and put her arm around another man. He said he did not know who the person was, but that [Ms A] told him it was her sister's boyfriend. He told [Ms A] her behaviour was unacceptable and she sent him to sit elsewhere. On the way home from the party [Ms A] was angry with him and said he had made a fuss. He said that spouses can each correct the other if they are wrong, and need to point out if the other's behaviour is not acceptable. He said she became angry and slapped him. When they arrived home she took his house and car keys and told him to leave the home. The following day her parents and relatives mediated and she allowed him back into the house.

8. The second incident he describes occurred after a community function at the [temple]. He said [Ms A] drank too much and danced in a lewd way by pulling up her skirt, which he found unbalancing. [The applicant] said [Ms A] told him this is the way of life in Australia, but he said he does not see everyone in Australia behaving that way. On the way home, after he took her sister home, they argued and [Ms A] pulled on the steering wheel, asking him to stop and leave the car. He said she drove home and her sister had to ask her husband to find him and drive him home. When he arrived she would not open the door until her sister intervened, after which he slept on the sofa. In the morning her parents and relatives again came to reconcile the parties and she allowed him to stay.
9. [The applicant] said the issues started after [Ms A] began receiving text messages from another man asking her out for coffee. [Ms A] said this person had been her friend for 20 years.

HISTORY OF THIS MATTER

10. On 16 May 2016, the (then) Department of Immigration and Border Protection (the Department) were advised the relationship between [the applicant] and [Ms A] had broken down.
11. On 14 June 2016, the Department wrote to [the applicant] inviting him to comment on the information that the relationship had broken down. His legal representative replied on 12 July 2016 stating they had been instructed to respond and asking for further time in which to respond. The legal representative again requested more time on 5 August 2016.
12. On 10 August 2016, the representative confirmed [the applicant] was in the process of providing more information to support his claim of family violence.
13. On 4 October 2016 the representative advised that due to language difficulties the provision of additional information was taking longer than expected and they requested an extension of time to provide doctors' reports and additional information.
14. On 12 December 2016 a further extension of time to provide evidence of the relationship was granted, and the information became due on 8 January 2017.
15. On 17 January the delegate made a decision to refuse the visa on the basis that [the applicant] was not the spouse of [Ms A] before the relationship broke down.
16. [The applicant] applied for a review of this decision on 30 January 2017.
17. On 25 July 2017, the Tribunal wrote to [the applicant] via the same legal representative, inviting him to provide information to show that he was in a relationship with [Ms A] or information to show he had made a valid claim of family violence. No response was received to this letter.
18. On 22 August 2017, the Tribunal wrote to [the applicant] pursuant to s.359(2) of the Act again inviting him to provide this information by 5 September 2017. This letter advised he could seek an extension of time prior to 5 September 2017. It also advised that if the Tribunal did not receive the information within the period allowed or any further extension, the Tribunal may make a decision on the review without taking any further action to obtain the information, and that he would also lose the entitlement to appear before the Tribunal to give evidence and present arguments.

19. An extension of time was requested as the file had been transferred to another lawyer within the same legal practice. The extension of time was granted and the information became due on 20 September 2017.
20. On 20 September 2017 the representative provided submissions which included that [the applicant] had been hampered in obtaining information to show he had suffered family violence because of the language barrier and the availability of professionals to obtain the reports. A referral to a social worker from [the applicant]'s general practitioner dated 20 September 2017 was provided together with a statutory declaration from [the applicant] and a letter dated 19 September 2017 from [an organisation] stating [the applicant] was on a waiting list to see a counsellor and the waiting time is 10–12 weeks. A mental health care plan dated 2 September 2017 was also provided.
21. On 16 October 2017, [the applicant] provided copies of photographs of himself and [Ms A].
22. On 15 January 2018, submissions were provided together with a statutory declaration from [the applicant] and a copy of a bank account statement for the period 15 June 2017 to 12 December 2017 in the names of [the applicant] and [Ms A]. The submissions state [the applicant] is unable to obtain a further statement from [the organisation] as he has been advised that they do not have the capacity to provide an assessment or a report on family violence. Further claims are made about [Ms A]'s recent behaviour to [the applicant]. Further time is sought to provide evidence of family violence in the prescribed form.
23. On 18 January 2018 a statutory declaration was provided by [a named person] in support of [the applicant]'s claim of family violence.
24. Real consideration was given as to whether [the applicant] has lost his right to a hearing as he had not provided the information requested of him within the required time, in the context of numerous requests for this information from both the Department and the Tribunal. As it is no small matter to lose the right to a hearing, [the applicant] was given the benefit of the doubt and a hearing was held on 23 January 2018, at which [the applicant] sought further time to establish his claims of family violence. [The applicant] was provided with seven days after the hearing to provide any further information, and submissions and further statutory declarations were provided on 30 January 2018.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. In the present case, [the applicant] claims the relationship with [Ms A] has ceased, and he has been the victim of family violence. He seeks to satisfy the requirements in cl.801.211(6) which are:
 - He would meet the requirements in cl.801.211(2), except that:
 - The relationship between him and his sponsoring partner has ceased; and
 - He has suffered family violence committed by the sponsoring partner.
26. The first requirement is that he would meet the requirements of cl.820.221(2). This requires that he was in a spouse relationship with [Ms A] prior to it ceasing.¹
27. The delegate was not satisfied [the applicant] was in a spouse relationship with [Ms A] as defined in the Act and the Regulations.

¹*Hanna v Minister for Immigration and Border Protection* [2016] FCA 282 at [23].

28. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. People in a married relationship must:
- Be married to each other under a marriage that is valid for the purposes of the Act;
 - Have a mutual commitment to a shared life as husband and wife to the exclusion of all others;
 - Have a genuine and continuing relationship; and
 - Live together or not live separately and apart on a permanent basis.
29. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3) of the Regulations.
30. Against the history provided by [the applicant], it must be determined if he was the spouse of [Ms A] before the relationship broke down.

Are the parties validly married?

31. [The applicant] and [Ms A] were married in Australia on [date] March 2014 and [the applicant] provided a copy of their marriage certificate.
32. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Regulation 1.15A(3) factors

33. The factors in r.1.15A(3) must be taken into account in deciding if the parties had a mutual commitment to a shared life to the exclusion of all others, the relationship was genuine and continuing, and whether the parties lived together or did not live separately and apart on a permanent basis.

Financial aspects of the relationship

34. The financial aspects of the relationship include whether there is joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party and any sharing of day-to-day household expenses.
35. [The applicant] states he is unable to access documents from the time of the relationship as [Ms A] will not allow him access to these documents. He provided his personal bank account statement. [The applicant] said because [Ms A] did not work, everything they purchased was under his name including the furniture and the car. An invoice for the purchase of a car was provided with invoice addressed to [Company 1]. [The applicant]'s bank account is for [Company 1]. An ASIC search shows he is the sole director and shareholder of this company.
36. On being asked how him having an account solely in his name was consistent with his account of [Ms A] managing and controlling the finances, [the applicant] said [Ms A] had his key card and used internet banking.

37. He said he paid [Ms A]'s mortgage and that he would transfer money from his account to her account for her to pay the mortgage that was solely in her name. On being asked if he had anything that would show he paid [Ms A]'s mortgage, he showed only transfers from his accounts. The account statement he provided showed approximately three to four occasions on which there were transfers of approximately \$1,000 to [Ms A], which may have been the mortgage payments.
38. [The applicant] said [Ms A] controlled him financially and would not allow him access to the money he earned. He said he worked long days, up to 16 or 17 hours and would earn \$10,000 per month at times but she would not allow him \$500 for his sick parents.
39. [The applicant] says they bought a [shop] in [a suburb] in August/September 2015 from his savings and that he would help in the shop when he was not working. He said he paid all the expenses for the house.
40. [The applicant] said there were no joint liabilities. On being asked if they pooled financial resources, [the applicant] said his money was transferred to a joint account but there are few transfers in the account statements provided to support this statement. In regard to sharing household expenses, [the applicant] said in the first two years after he came to live in Australia he paid for all the household expenses. He said that in Cambodia the custom is for the man to earn the money and the woman to manage the household finances.
41. There is little other than some transfers to [Ms A]'s account, and [the applicant]'s statement that she used his account, to show that they pooled resources or shared expenses. The main account is solely in [the applicant]'s name. There are no joint assets or liabilities.

Nature of the household

42. The nature of the household includes joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
43. [Ms A] has four children from two prior relationships; however, [the applicant] said none of the children live with her and there is no joint responsibility for the care and support of children despite [Ms A] having four children.
44. In regard to the living arrangements [the applicant] said [Ms A] wanted him to obey her rules, they argued and he was excluded from the home at times. He went to stay with her friend. While he did not give oral evidence on this matter, I am satisfied that they lived at the same property, with occasional times when he stayed elsewhere, until he left the property.
45. In regard to the housework, [the applicant] said [Ms A] would cook and he would clean and vacuum, as well as do the dishes and the gardening.

Social aspects of the relationship

46. The social aspects of the relationship include whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
47. With the application for the visa, [the applicant] provided statutory declarations from [Mr B] and [a named person] in support of the relationship. After [Ms A] withdrew her sponsorship, he provided statutory declarations from [two named persons] stating the relationship was genuine but that it had broken down. He said they went to community functions such as

friends' weddings, birthday parties and funerals. [The applicant] said they lived together for two and a half years.

48. After the hearing he provided statutory declarations from [Ms C] [and two named persons]. As relevant to the social aspects of the relationship, the declarants each state they knew [Ms A] before they knew [the applicant], that he was a good husband, and he and [Ms A] appeared to be happy or in love. [Ms C] states she was present at their marriage as [Ms A]'s best friend.
49. A statutory declaration from [Mr B] states he knows [Ms A] as she was married to his friend. He states he is now best friends with [the applicant]. [Mr B] states that when they were first married everything seemed to be happy.

Nature of the persons commitment to each other

50. This includes the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term.
51. [The applicant] said they would provide support to each other, he saw the relationship as long-term and they were very happy. The duration of the relationship is approximately two and a half years during which time I accept they lived together.
52. Information contained in the Department's file was put to [the applicant] under s.359AA of the Act. This information included that:
 - [The applicant] had a child in Cambodia,
 - He was abusive, distant and jealous,
 - He tried to control how [Ms A] talked, dressed and acted,
 - He argued with her in public,
 - He is a womaniser and a flirt,
 - He saw a lawyer about his right to stay in Australia without [Ms A] while he was living with her. [Ms A] discovered this after he was sent a letter about payment,
 - He stopped sleeping in their bedroom and slept in the lounge room, and then in a separate bedroom,
 - He said he just wanted to work and save money to go back to Cambodia and open a business,
 - [Ms A] was suspicious he was still with his partner in Cambodia and was using her to get a visa before bringing his partner and child to Australia,
 - [Ms A] saw him messaging women and spending time on the telephone with them, but when she asked to see his phone he deleted his call log and all of the messages,
 - When they last argued [the applicant] said he only had three months until he got a permanent visa so there was nothing she could do. He packed his bags and left and changed the internet banking details, leaving her with the debt and the bills.

53. [The applicant] requested time to provide comments and a response to this information, and was given time after the hearing to provide any further comments or response.
54. After the hearing [the applicant] provided a statutory declaration stating he does not have any children, he has not been married other than to [Ms A], he did not have a relationship with any other person during his marriage, he was not abusive and the statements made by [Ms A] about him having another child and partner and only wanting permanent residence are false. He did seek advice about his situation as he was being treated badly and there is nothing wrong with getting advice. [Ms A] ended the marriage and it was her decision.
55. [The applicant] provided a document stated to be a translation of a statement from his parents and two elder sisters that he has never been married and has no children. On the reverse it states that since [the applicant] moved to Australia they have not had any contact with [Ms A], even when the parents were sick and in hospital. It states that after he had lived in Australia for two years, [the applicant] contacted the family and said he had broken up with [Ms A] because she gave him pressure without freedom. [The applicant] has in fact been married to [Ms A], contrary to what is asserted in the document. The statement says that the family has not had contact with [Ms A] since [the applicant] moved to Australia, and as such the statement is a report of what [the applicant] has told them.
56. It is clear from [the applicant]'s evidence that he and [Ms A] did not have the same expectations about behaviour in public or with members of the opposite sex. This does not support that they provided each other with companionship and emotional support or that they saw the relationship as long-term. [Ms A] did not believe the relationship was genuine.

Other matters

57. The social worker who provided a statutory declaration in support of [the applicant] having suffered family violence attended the hearing and gave evidence. She said [Ms A] is known in the community for having poor relationships and behaving badly towards her partners. She said [Ms A] was financially abusive towards [the applicant], has anger she cannot control and most of her family are scared of her. The social worker said she was invited to their wedding and has known [Ms A] for 25 years; and [the applicant] is [Ms A]'s fifth partner.
58. [The applicant] also provide statutory declarations from various members of the community in support of his assertion that suffered relevant family violence, including from people who say they have known [Ms A] for a number of years. It would seem from these statutory declarations that [the applicant] has the support of at least a segment of the community and [Ms A] does not. It would also seem that [Ms A] is viewed in a certain way at least some members of the community. I do not consider a person's reputation is determinative of whether a particular relationship is genuine and continuing at a particular point in time or whether the parties have a mutual commitment to a shared life to the exclusion of all others.

Conclusion

59. While I am satisfied the parties lived together for a considerable period of time, [the applicant] was not convincing in his account of the relationship and appeared focused on establishing how badly he had been treated. His account of being controlled by [Ms A] financially was not consistent with his sole control over his personal bank account and sole ownership of the car. They did not hold joint assets or liabilities. There are differences about who was left with the debt between [the applicant]'s oral evidence and [Ms A]'s written statement to the Department. There is no joint responsibility for children and there is disagreement between the parties about behaviour in public and friendships with people of the opposite sex. [The applicant] has the support of at least a segment of the local

community and [Ms A] does not; however, I do not consider this determinative of the nature of the relationship.

60. Having considered all of the information before me and the factors in r.1.15A of the Regulations, I am not satisfied that the relationship was genuine relationship or that they had a mutual commitment to a shared life to the exclusion of all others.
61. It follows that I am not satisfied that [the applicant] was the spouse of [Ms A] as defined in s.5F of the Act. As a result, he does not meet cl.801.221(6) of Schedule 2 to the Regulations. As I have found he was not the spouse of [Ms A], it is not necessary for me to consider whether he suffered relevant family violence. There is no evidence before me that [the applicant] meets any of the alternative sub-criteria. As [the applicant] does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.

DECISION

62. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Kate Millar
Member